UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) URIKA DEAN, on Behalf of Herself and All Others Similarly Situated, Plaintiff, v. (1) MICHAEL BILLINGS (D/B/A) MIDWAY ISLAND, (2) MIDWAY ISLAND, LLC, Defendants.	)	Case No. CIV-16-1459-M

DEFENDANT MICHAEL BILLINGS' AMENDED MOTION TO DISMISS

COMES NOW Defendant Michael Billings (hereinafter, "**Billings**"), and for his Amended Motion to Dismiss Plaintiff's Complaint against Billings for failure to state a claim, states as follows:

INTRODUCTION

On December 21, 2016, Plaintiff, on behalf of herself and all others similarly situated, filed this present action against Defendants Billings and Midway Island, LLC, asserting violations of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter, the "**FLSA**") for failing to pay minimum wages and overtime wages as required by the FLSA, failing to pay overtime wages in violation of the Oklahoma Wage and Hour Law, and for unjust enrichment. (*See* Complaint filed December 21, 2016.) Plaintiff's action is brought both against the corporate entity, Midway Island, LLC, and Billings, individually. However, the only allegations asserted against Billings in the Complaint are that, "Upon information and belief, Mr. Billings owns Midway Island, LLC and does business as Midway Island," (Complaint, at ¶ 4), and that, "Upon information and belief, Midway Island, LLC is owned by Michael Billings and the nightclub, Midway Island, is directly run by Michael Billings." (Complaint, at ¶ 5.) For the reasons set forth herein, this Court should dismiss the action against Billings as Plaintiff has failed to state a claim against Billings for which relief can be granted.

LEGAL ANALYSIS

The Court will dismiss a cause of action for failure to state a claim only when the factual allegations fail to "state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), or when an issue of law is dispositive, *see Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). A complaint need not contain detailed factual allegations, but a plaintiff is obligated to provide the grounds of entitlement to relief that consists of more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. *See Bell Atlantic*, 550 U.S. at 555. The Court accepts the facts alleged in the complaint as hue, even if doubtful in fact, *see id.*, and views all reasonable inferences from those facts in favor of the plaintiff, *see Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir.2006). Viewed as such, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic*, 550 U.S. at 555. The issue in resolving a motion such as this is "not whether [the] plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewics v. Sorema, N.A.*, 534 U.S.

506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)).

I. Plaintiff's claims against Billings brought for violations of the FLSA should be dismissed.

In FLSA cases, personal liability has often been imposed on individual officers in a corporation without conducting a traditional veil-piercing analysis. *See, e.g., Saavedra v. Lowe's Home Centers, Inc.*, 748 F. Supp. 2d 1273, 1284 (D.N.M. 2010); *Digiore v. State of Ill.*, 962 F. Supp. 1064, 1080 (N.D. Ill. 1997); *Donovan v. Agnew*, 712 F.2d 1509, 1511–12 (1st Cir. 1983); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194–95 (5th Cir. 1983), cert. denied, 463 U.S. 1207 (1983); *Marchak v. Observer Publications, Inc.*, 493 F. Supp. 278, 282 (D.R.I. 1980); *Brennan v. Whatley*, 432 F. Supp. 465, 469 (E.D. Tex. 1977); *Hodgson v. Royal Crown Bottling Co.*, 324 F. Supp. 342, 347 (D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); *Schultz v. Chalk–Fitzgerald Construction Co.*, 309 F. Supp. 1255 (D. Mass. 1970).

Such liability has instead been imposed on the ground that the particular individual falls within the FLSA's definition of "employer" and thus shares statutory obligations with the corporation itself. *See, e.g. Saavedra*, 748 F. Supp. 2d at 1284 ("A person must be an 'employer' within the meaning of the ... FLSA to be held individually liable under [the] statute."); *Digiore*, 962 F. Supp. at 1080 (the FLSA contemplates individual liability under term "employer"); *Donovan*, 712 F.2d at 1511 (imposing liability for FLSA violations upon an individual shareholder as an "employer" within the meaning of FLSA Section 3(d), 29 U.S.C. § 203(d)).

This occurs because an "employer" under the FLSA is defined to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). "Person" includes "an individual," and "employ" includes to "suffer or permit to work." *Id.* Courts construe these provisions expansively, *Robertson v. Bd. of Cty. Comm'rs of Cty. of Morgan*, 78 F. Supp. 2d 1142, 1150 (D. Colo. 1999), and an employee may have several simultaneous employers, *id.*; *Falk v. Brennan*, 414 U.S. 190, 195 (1973).

The Tenth Circuit has considered numerous factors when determining whether an individual is an "employer" under the FLSA, including whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records. *Hodgson v. Okada*, 472 F.2d 965, 968–69 (10th Cir. 1973); *Mitchell v. Hertzke*, 234 F.2d 183, 189–90 (10th Cir. 1956); *see also Robertson*, 78 F. Supp. 2d at 1150–51; *Herman v. RSR Security Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) ("[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question, ... with an eye to the 'economic reality' presented by the facts of each case."); *Baker v. Flint Eng'g & Const. Co*, 137 F.3d 1436, 1439 (10th Cir. 1998) (applying these factors to assess the employer-employee relationship). Courts have also looked at the level of operational control the individual has over the company, including whether the individual is "involved in the day-to-day operation or ha[s] some direct responsibility for the supervision of the employee.' " *Koellhoffer v. Plotke–Giordani*, 858 F. Supp. 2d 1181, 1189–90 (D. Colo. 2012) (quoting *Alvarez Perez v. Sanford–Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160 (11th Cir. 2008)).

In her complaint, Plaintiff does not provide any facts to support a finding that Billings is an "employer" under the FLSA or that Plaintiff and Billings (and others similarly-situated) were in an employer-employee relationship as contemplated by the Act. Plaintiff merely states that, "Upon information and belief, Mr. Billings owns Midway Island, LLC and does business as Midway Island," (Complaint, at ¶ 4), and that, "Upon information and belief, Midway Island, LLC is owned by Michael Billings and the nightclub, Midway Island, is directly run by Michael Billings." (Complaint, at ¶ 5.) Plaintiff does not flesh out any of the above-mentioned factors or explain Billings' operational control over Midway Island, LLC, including whether Billings hired and fired employees; oversaw conditions of employment; set the rate and method of payment; maintained employment records; was involved in the day-to-day operation of the company; or supervised any employees, much less Plaintiff. *See Iqbal*, 556 U.S. at 678 (naked assertions without further factual enhancement are insufficient under Rule 12(b)(6)). This Court should conclude that the facts alleged in Plaintiff's Complaint are not legally sufficient to state a claim for relief against Billings for violation of the FLSA and, accordingly, dismiss Plaintiff's Complaint against Billings.

II. For the same reasons, Plaintiff's claims for violation of the Oklahoma Wage and Hour Law and for unjust enrichment should be dismissed.

Oklahoma law recognizes that "[g]enerally, a corporation is regarded as a legal entity, separate and distinct from the individuals comprising it." *Fanning v. Brown*, 2004

OK 7, ¶ 16, 85 P.3d 841, 846. But Oklahoma permits courts to "disregard the corporate entity and hold stockholders personally liable for corporate obligations or corporate conduct under the legal doctrines of fraud, alter ego and when necessary to protect the rights of third persons and accomplish justice." *Id.* Stated another way, Oklahoma law uses a disjunctive standard and authorizes veil piercing if a plaintiff shows "*either* '(1) that the separate corporate existence is a design or scheme to perpetrate fraud, *or* (2) that [the] corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality" or alter-ego of the shareholder. *King v. Modern Music Co.*, 2001 OK CIV APP 126, ¶ 16, 33 P.3d 947, 952 (emphasis added); *see also Cyprus Amax Minerals*, 2012 WL 4006122 at *2 (noting "Oklahoma's test for veil-piercing is stated in the disjunctive"). Plaintiff's Complaint does not state any basis for disregarding the corporate existence under either a fraud theory or that the corporate form is so organized and controlled that it is merely an instrumentality or alter-ego of Billings. Absent any such allegations, Plaintiff's Complaint fails to state enough facts to state a claim that is plausible on its face against Billings and should be dismissed.

CONCLUSION

For the above and foregoing reasons, this Court should dismiss Plaintiff's Complaint against Billings for failure to state a claim upon which relief can be granted. Plaintiff's Complaint fails to state any allegations against Billings individually that would, if true, state a claim against Billings for violation of the FLSA, the Oklahoma Wage and Hour Law, or unjust enrichment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of March, 2017, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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